Office - Supreme Court, U.S.
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AUG 12 1983
ALEXANDER L. STEVAS
CLERK

No. 82-2137

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

JBL ENTERPRISES, INC., et al.,
Petitioners,

vs.

JHIRMACK ENTERPRISES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT OF OWNERSHIP

Respondent Jhirmack Enterprises, Inc. is wholly owned by Playtex Holding Co., Inc., which in turn is wholly owned by International Playtex, Inc., which in turn is wholly owned by Esmark, Inc. Respondent has no subsidiaries.

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STATEMENT OF THE CASE

Respondent Jhirmack Enterprises, Inc. ("Jhirmack") manufactures hair care and beauty products. It introduced its first line of hair care and beauty products in 1972. To gain a foothold in this intensely competitive industry, Jhirmack began with a marketing program—successfully implemented by other fledgling manufacturers of like products— of selling its products solely through professional salon trade ("PST") outlets consisting of beauty salons, barbershops, hairstyling establishments, beauty schools, etc. (JBL App. B-2).[1] To implement its marketing policy,

[1]Petitioners' appendix is cited herein as "JBL App."; the clerk's record on appeal is cited herein as "CR"; and the reporter's transcript of the relevant market trial is cited herein as "RT."

Jhirmack contracted with approximately 80 independent distributors (including petitioners) requiring each distributor to "exclusively devote its entire time and best efforts to promote and sell" Jhirmack products to PST outlets in their assigned territories (CR 389, p. 68). Petitioners are former Jhirmack distributors for Utah, Idaho and Indiana.

By marketing its products through PST outlets rather than "over-the-counter" or "OTC" outlets (including drugstores, department stores and supermarkets), Jhirmack was able to achieve many competitive benefits. It encouraged distributors to make a substantial investment of time and effort in a distributorship (CR 389, Jheri Redding depo., 64). It facilitated competition with other PST brands (CR 389, Jheri Redding depo., 64-65). It allowed Jhirmack to gain acceptance with the professional salons by enabling salons to stress the "professionally tested" and "professionally used" aspects of Jhirmack products (JBL App. E-41, E-42). Finally, it allowed Jhirmack to develop name recognition and customer patronage at the salons without having to incur the massive advertising investment which OTC distribution would have required and which Jhirmack could not then afford (CR 389, Jheri Redding depo., 64-65; Kornfield depo., 66-67).

Petitioners acknowledged that Jhirmack's threshold policy of distributing solely through PST outlets was essential to its goal of gaining entry to this highly competitive market (CR 389, Williams depo., 89-92; Robinson depo., 61; Million depo., 62-63). For that reason, petitioners wholeheartedly supported it; they regarded it as a commitment by Jhirmack upon which they relied; and they ac-

cordingly disavowed any desire to sell Jhirmack products to the OTC.[2]

In 1976-77, Jhirmack heard reports that Jhirmack products were being diverted by distributors to OTC outlets contrary to Jhirmack's marketing plan (CR 333, Jhirmack Ex. A-1 - A-7, B-1 - B-4). Upon receiving such reports, Jhirmack took steps to protect its exclusive distribution policy by discouraging such diversion. (*id.*) However, Jhirmack made no complaints about the prices being charged and never sought to enforce resale prices charged by distributors or by their customers (Million depo., 5-6; Williams depo., 9-12; Burkinshaw depo., 15-18; Robinson depo., 22-23). In 1977 and 1978, Jhirmack terminated petitioners' distributorships because of their failure to fulfill sales projections within their territories (CR 165).

Judged by its ability to gain a foothold in the highly competitive hair care and beauty care industry, Jhirmack's

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[2]JBL president John Williams testified his customers were beauty schools, salons, barbershops and other professional hairdressers: "I competed in the professional hair market of beauty salons and other professionals in the beauty industry" (RT 631:23-632.6). Petitioners Million and Robinson also testified they did not make any sales, at a discount or otherwise, to OTC outlets. Lois Million testified that "no one in the world wanted to keep it a professional product more than I" (CR 308, Million depo., 60:2-4). Keeping it professional was part of the Jhirmack agreement (*id.* at 278:8-28). Million supported that policy because "I was a hairdresser and I believed in it" (*id.* at 280:6-10; *see also* 383:22-28). Jean Robinson testified that she would never sell to the OTC: "To me that's unethical because I don't sell professional products to the retail trade" (CR 389 at 61; *see also* CR 312, Robinson depo. 289:21-28). It never entered her mind to sell Jhirmack to retail stores (*id.* at 291:3-18). Both Robinson and Million declared in their depositions that the professional-only policy was an essential distribution feature which constituted a moral as well as a business commitment by them (*id.* at 289:21-28; CR 309, Million depo. 280:6-26, 345:5-28).

marketing program of selling only to PST outlets proved successful. Jhirmack's market share grew to 2.3% in 1976 and to 4.2% in 1978 (JBL App. E-34). Having developed sufficient name recognition and steadily increasing sales by its PST-only marketing policy, Jhirmack decided in 1979 that it was then strong enough to attempt distribution through both PST and OTC outlets. By the fall of 1979, Jhirmack was able to attract a nationally recognized distributor experienced in selling goods to OTC outlets and willing to invest the millions of dollars necessary to conduct a nationwide marketing campaign—International Playtex, Inc. ("Playtex"). In return for Jhirmack's appointment of Playtex as its distributor to OTC outlets in December 1979, Playtex agreed to spend $7 million in promoting Jhirmack products within the first year and at least 15% of annual net sales thereafter (Jhirmack Ex. EE, p. 6).

Jhirmack's ability to obtain this imposing—and essential—commitment from Playtex and thereby take its place on the OTC shelves next to such larger rivals as Clairol and Revlon attests to the procompetitive success of its initial PST-only distribution policy.

THE PROCEEDINGS BELOW

In July 1978, petitioners filed suit alleging that Jhirmack violated §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act by imposing unreasonable customer and territorial restrictions; tying the purchase of some Jhirmack products to the purchase of other Jhirmack products; and terminating their distributorships. Petitioners' first amended complaint alleged that Jhirmack's distributorship contracts were "subject to unreasonable territorial and

customer restraints, thereby precluding its distributors from free and unrestricted competition" (JBL App. E-22).

Pursuant to stipulation of the parties, the District Court on June 12, 1980 consolidated this action with a related action entitled *Booth, et al. v. Jhirmack Enterprises, Inc., et al.* (Civ. No. 80-0249 WWS)[3] for a separate trial of all issues regarding (1) the relevant market, (2) Jhirmack's share of the relevant market and (3) petitioners' "tying" claims (JBL App. E-88). The decision of the court and the parties to have a preliminary trial of the relevant market was dictated by the nature of petitioners' claim as then posited: the court and all parties were proceeding from the premise that petitioners were attacking non-price customer and territorial restrictions imposed by Jhirmack upon its distributors. Such vertically imposed non-price restrictions were subject to "rule of reason" analysis under *Continental T. V. Inc. v. GTE Sylvania Inc.* (*"Sylvania"*), 433 U.S. 36, 54-59 (1977). Hence definition of the relevant market was necessary. *See, e.g., DeVoto v. Pacific Fidelity Life Ins. Co.*, 618 F.2d 1340, 1344 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 389 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979).

Petitioners' original complaint had also pled resale price maintenance. However, the District Court had previously dismissed that claim when petitioners admitted they were not victims of a resale price-fix (CR 398, Ex. B; CR 400;

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[3]The *Booth* action was instituted in 1980 by former Jhirmack distributors who alleged that Jhirmack's subsequent appointment of Playtex as its OTC distributor was a violation of the antitrust laws (JBL App. B-4, B-5). Summary judgment was entered for defendant in the *Booth* case and was affirmed by the same Court of Appeals decision which petitioners seek to review here (*id.* at B-30). No petition for writ of certiorari was filed in the *Booth* action.

RT 10-24). While petitioners' later amended complaint alledged that Jhirmack's distribution policy had the effect of eliminating sales to discounters, petitioners again conceded their business was not affected thereby and represented to the trial court that "no claim of a price-fixing agreement was being made" (JBL App. E-80). Petitioners' disclaimers to the court were unequivocal:

> "The Court: What are they complaining about? Are they complaining about being restrained against selling Jhirmack's products, essentially to OTC and similar types of outlets, Isn't that what you're complaining about?
>
> Mr. Kithas [petitioners' counsel]: *No, that is not their complaint.*" (CR 397 at 4; RT 1135:14-18)
>
> "The Court: But you are not claiming that there is a price-fixing agreement here, are you?
>
> Mr. Kithas: *Not a price-fixing agreement, no.*" (CR 397 at 4, RT 1137:21-23)
>
> "The Court: All right. Are you representing to the Court, then, that your plaintiffs do not complain about being restrained from selling to retailers other than salons?
>
> Mr. Kithas: *Not in the antitrust context of this.*" (CR 397 at 4; RT 1137:21-23; 1138:4-8)
>
> "The Court: Well, is this not material to the antitrust claim, that it was material to your clients that they be free to sell to anybody including somebody who might divert to OTC, is that not material to the antitrust claim?
>
> Mr. Kithas: Well, I don't think it was material to them that they be able to sell to persons who sold to the OTC *because none of them desired to sell to persons who sold to the OTC. None of them attempted directly to sell to persons who sold to the OTC.*" (RT 1139:21-1140:4) (emphasis added)

Consequently, both Jhirmack and the court were led to believe that petitioners' complaints about Jhirmack's marketing system presented a "rule of reason" claim and not a *per se* claim of resale price maintenance. For that reason, both the parties and the court embarked upon a preliminary trial of the relevant market. Following trial, the court entered Findings of Fact and Conclusions of Law which defined the relevant market and determined that Jhirmack's share of that market was no more than 4.2% (JBL App. E-34).

Because that market share was insufficient as a matter of law to make out a claim under the rule of reason (JBL App. D-9, D-22), Jhirmack thereafter moved for summary judgment. Faced with dismissal, petitioners resurrected their prior claims that Jhirmack's policy of marketing its products exclusively through PST outlets was pursuant to a conspiracy with certain distributors to fix resale prices and was therefore *per se* unlawful despite Jhirmack's inconsequential market share (*id.* at D-5). Judge Schwarzer dismissed petitioners' belated claims as "wholly without merit" (*id.* at D-10 - D-12) and the Court of Appeals, in a unanimous decision, affirmed (JBL App. B-30).

REASONS FOR DENYING THE WRIT

Petitioners seek a writ of certiorari because, they assert, their claims "involve an interplay between the *per se* standard consistently applied to vertical price-fixing . . . and the rule of reason standard applied to vertical customer restrictions" (JBL Petition, p. 4). This case presents no such "interplay." The only question that can be conjured up from the record below—and it is patently undeserving of this Court's attention—is whether both lower

courts were correct to dismiss petitioners' claims in the absence of *any* evidence that Jhirmack conspired with *anybody* to fix prices or terminate petitioners' distributorships.

I

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE EVIDENTIARY QUESTION PRESENTED BY PETITIONERS

During the relevant market trial, petitioners expressly disavowed any claim of a price-fixing conspiracy (*supra*, pp. 6-7). However, because the relevant market trial established that Jhirmack had only a minuscule share of highly competitive market, petitioners responded to Jhirmack's motion for summary judgment by resurrecting their previously abandoned price-fixing claim in an attempt to trigger the *per se* rule and thereby avoid the clear edict of *Sylvania*. Thus petitioners asserted that Jhirmack was engaged in a vertical price-fixing conspiracy and had terminated petitioners at the behest of other Jhirmack distributors in furtherance of that price-fixing scheme.

While petitioners' belated claim of price-fixing had previously been dismissed by the District Court for lack of evidence and thereafter abandoned by petitioners, both the District Court and the Court of Appeals nonetheless indulged petitioners by again fully analyzing their resuscitated claim. Both courts, however, were forced to conclude there was still no evidence to support it. Thus the District Court held "[t]here is no evidence . . . that Jhirmack fixed the resale prices for its products or enforced compliance with a particular price schedule" (JBL App. D-10). Affirming, the Ninth Circuit also held there was no evidence that

Jhirmack's distributors or the PST outlets adhered to Jhirmack's suggested prices (JBL App. B-10).

Petitioners were accorded full discovery to develop their claims and both courts below fully reviewed whatever evidence petitioners had. In holding that evidence insufficient, both courts below were plainly correct. There was no evidence that any distributor or any salon ever requested Jhirmack to terminate petitioners. There was no evidence that other Jhirmack distributors or their customers, the salons, ever complained to Jhirmack about petitioners' prices. There was no evidence that Jhirmack ever complained to petitioners about their prices. Indeed, there was no evidence that petitioners engaged in price competition at all with other Jhirmack distributors. To the contrary, petitioners admitted they did not want to sell to OTC outlets—at discount or otherwise (*supra*, p. 3, fn. 2). Petitioners nonetheless assert "[t]he trier of fact should decide whether the purpose of the combination was to eliminate intrabrand price competition, or promote interbrand competition" (JBL Petition, p. 32). But that is not so if petitioners, after full discovery, are unable to produce significant probative evidence of such an unlawful purpose. *First Nat. Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 284-90 (1968).

It has never been clear who petitioners suspected were Jhirmack's accomplices. In the lower courts, petitioners alleged that Jhirmack conspired with petitioners' *competitors*, i.e., other distributors, to fix prices and terminate petitioners. That claim failed for want of evidence. Now petitioners broaden the periphery of their complaint, asserting that Jhirmack was enmeshed in a massive con-

spiracy with countless beauty parlors and barbershops across the nation. Thus petitioners argue that it was the *salons'* collective "purpose" to maintain supracompetitive prices and that Jhirmack "catered" to that purpose by adopting a PST-only marketing system. But petitioners cannot speculate about the "purpose" of over 20,000 nameless salons; impute that purpose to Jhirmack without any evidence of communication between them and Jhirmack concerning prices; and dub that a *per se* violation of the antitrust laws.

Given petitioners' total failure of proof, both courts below acted correctly in dismissing petitioners' price-fixing claim. It is well established that, when both the District Court and the Court of Appeals concur in their findings on the record below, this Court will not grant certiorari to review those findings. *See Faulkner v. Gibbs*, 338 U.S. 267, 268 (1949); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 343 (1977); *Blau v. Lehman*, 368 U.S. 403, 408-09 (1962). As Mr. Justice Holmes declared in *United States v. Johnston*, 268 U.S. 220, 227 (1925), "We do not grant a certiorari to review evidence and discuss specific facts." Petitioners offer no good reason why the Court should do so here.

II

CERTIORARI SHOULD NOT BE GRANTED TO RESTRICT THE SYLVANIA DOCTRINE

Both courts below conscientiously applied the *Sylvania* doctrine to the marketing program adopted by Jhirmack. Applying the rule of reason to Jhirmack's distribution system, both courts held that while it reduced intrabrand competition, any such reduction was offset by the promotion

of interbrand competition in the relevant market. Dissatisfied with that ruling, petitioners now ask this Court to grant certiorari and rule that *Sylvania* should not apply whenever a vertical non-price restraint has the effect—and thus inferentially the "purpose"—of lessening intrabrand price competition.[4]

Petitioners' claim does not warrant this Court's review and is certainly undeserving of review on this record, which both lower courts held was bereft of evidence that Jhirmack had conspired with anybody to fix prices or had terminated petitioners for the purpose of fixing prices. *Sylvania* and its progeny have uniformly recognized that non-price vertical restraints invariably reduce intrabrand competition and, perforce, intrabrand price competition. But that does not render the rule of reason inapplicable. *Sylvania,* 433 U.S. at 54; *Valley Liquors, Inv. v. Renfield Importers, Ltd.,* 678 F.2d 742, 745 (7th Cir. 1982) ("[T]he suggestion that proof of a reduction in intrabrand competition creates a presumption of illegality is inconsistent with the test that the courts apply in restricted distribution cases"); Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is Sylvania a Way Out?,* 67 Va. L.Rev. 1457, 1467 (1981). Indeed, this Court recently observed in *Broadcast Music, Inc. v. Columbia Broadcasting,* 441 U.S. 1, 23 (1979)—a horizontal case—that "[n]ot all

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[4]That petitioners frontally attack *Sylvania* is evident from their vigorous objection to the following statement by the Government in its *amicus curiae* brief in *Monsanto Co. v. Spray-Rite Service Corp.,* No. 82-914 (cert. granted): "'[T]he fact that a distribution restriction indirectly exerts some pressure on dealers' prices is not enough to transform a nonprice arrangement into resale price maintenance'" (JBL Petition, p. 24, fn. 8).

arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints."

If a reduction in intrabrand price competition were deemed enough by itself to subject a vertical non-price restraint to the *per se* rule, despite the proven benefit to interbrand competition, *Sylvania* would be a nullity. Every restrictive distribution system adopted by a manufacturer would be subject to the *per se* rule because every such distribution system has the effect of limiting intrabrand price competition. In fostering interbrand competition, *Sylvania* has proven to reflect sound antitrust policy. This Court should not employ its certiorari powers to consider petitioners' request that *Sylvania* be retracted in favor of a *per se* rule.

III

CERTIORARI SHOULD NOT BE GRANTED TO EXPAND THE THIRD CIRCUIT'S DECISION IN CERNUTO

Both courts below held there was no evidence that Jhirmack was guilty of price collusion. To bridge the gap between their claims and their evidence, petitioners request this Court not only to restrict *Sylvania* but also to expand the Third Circuit's decision in *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979). But that also provides no good reason for this Court to grant certiorari. Both the District Court and the Court of Appeals dealt carefully with petitioners' attempt to invoke *Cernuto* and both properly held that it did not apply.

Petitioners fail to show how both lower courts erred in holding that petitioners' evidence was insufficient to invoke *Cernuto*. As both courts below correctly observed, *Cernuto*, required proof (a) that Jhirmack terminated petitioners at the request of a competitor (so as to establish the requisite concert of action under § 1 of the Sherman Act) and (b) that Jhirmack's termination of petitioners was in furtherance of a vertical price-fixing scheme. As there was no evidence to support either of those *Cernuto* elements, *Cernuto* does not apply.

In rejecting petitioners' attempt to stretch *Cernuto* to fit their facts, the Ninth Circuit is not alone. On much stronger facts, several appellate decisions have repeatedly declined to allow *Cernuto* to be expanded so as to trench upon the *Sylvania* doctrine.[5] The *Cernuto* rule was not

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[5] *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir.), *cert. denied*, ... U.S. ..., 103 S.Ct. 362 (1982); *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 80 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742 (7th Cir. 1982); *Filco v. Amana Refrigeration, Inc.*, ... F.2d ..., 1983-1 Trade Cases (CCH) ¶ 65,450 (9th Cir. 1983); *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111, 115-17 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 856-57 (1st Cir. 1982); *H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941-45 (2d Cir. 1981), *cert. denied*, ... U.S. ..., 103 S.Ct. 176 (1982); *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1196 (6th Cir. 1982), *petition for cert. pending*, No. 82-848; *Roesch, Inc. v. Star Cooler Corp.*, ... F.2d ..., 1983-2 Trade Cases (CCH) ¶ 65,487 (8th Cir. 1983) (en banc); *Battle v. Lubrizol Corp.*, ... F.2d ..., 1983-2 Trade Cases (CCH) ¶ 65,488 (8th Cir. 1983) (en banc); *Products Liability Ins. v. Crum & Forster Ins.*, 682 F.2d 660, 663 (7th Cir. 1982); *Ron Tonkin Gran Turismo v. Fiat Distributors*, 637 F.2d 1376, 1386-87 (9th Cir.); *cert. denied*, 454 U.S. 831

applied in any of those cases despite proof of complaints by a competing distributor about plaintiff's lower prices, followed by defendant's termination of plaintiff's distributorship. There was *no* evidence here that anybody complained to Jhirmack about petitioner's prices or that anybody requested that Jhirmack terminate petitioners' distributorships. Petitioners are unable to demonstrate why this Court should grant certiorari on weaker facts so as to overrule several appellate decisions rendered against terminated distributors on stronger facts.

Unable to provide the courts below with any evidence that Jhirmack terminated petitioners at the request of petitioners' *competitors*, petitioners now contend to this Court that a *per se* case is established by complaints from *salons* about the sale of Jhirmack products to the OTC trade in violation of Jhirmack's distribution policy. But again, petitioners' reach exceeds their grasp. Jhirmack's distributorship contracts, in limiting sales to the PST trade, were held not to constitute an unlawful restraint upon trade under rule of reason analysis. Petitioners do not appeal that ruling. Given the legality of Jhirmack's distributorship contracts, Jhirmack would have been entitled to terminate petitioners for their breach thereof *even if* (contrary to all the evidence) Jhirmack did so at the request of a competing distributor *or* a salon. *Williams v. Independent News Co.*, 485 F.2d 1099, 1106 (3d Cir. 1973); *Red Diamond Supply, Inc. v. Liquid*

(1981); *Contractor Utility Sales v. Certain-Teed Products*, 638 F.2d 1061, 1072 (7th Cir. 1981); *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107, 1116-18 (5th Cir. 1979).

Carbonic Corp., 637 F.2d 1001, 1006-07 (5th Cir.), *cert. denied*, 454 U.S. 827 (1981).[6]

IV

PETITIONERS OFFER NO OTHER REASON FOR THIS COURT TO GRANT CERTIORARI

Petitioners do not even attempt to provide this Court with any legitimate reason why their novel antitrust claim, rejected by two lower courts as bereft of evidentiary support, deserves to be considered thrice. Certiorari review by this Court is properly reserved for consideration of important questions of law, to settle conflicts among lower court decisions and the like. All petitioners claim is that both the District Court and the Court of Appeals erred in holding that petitioners' claim suffered from an evidentiary shortfall. If that deserves review by this Court, it is difficult to imagine a lower court judgment that would not.

In their hope of triggering the grant of certiorari, petitioners assert that "confusion remains in the lower courts as to what conduct is price-fixing . . ." (JBL petition, p. 21). Petitioners might be unsure about the parameters of vertical price collusion, but they cite no decisions to indicate that such confusion exists "in the lower courts." Certainly there is no conflict among the circuits with respect to the claim posited here. Indeed, in light of its novelty, there could not be.

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[6]The court in *Red Diamond* declared: "Since it did not establish that the restrictions Liquid [defendant manufacturer] allegedly imposed upon it [plaintiff's distributor] contravened the antitrust laws, it perforce did not show that its alleged termination for violating those restrictions constituted an antitrust offense." 637 F.2d at 1007.

That petitioners' claim is unworthy of certiorari review is further demonstrated by the numerous petitions for certiorari which have been filed by terminated distributors within the past few years, all of which have been denied by this Court. *See Schwimmer v. Sony Corp. of America*, 677 F.2d 946 (2d Cir.), *cert. denied*, ... *U.S.* ....., 103 S.Ct. 362 (1982); *H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d (2d Cir. 1981), *cert. denied*, ... *U.S.* ....., 103 S. Ct. 176 (1982); *Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981); *Ron Tonkin Gran Turismo v. Fiat Distributors*, 637 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981); *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir.), *cert. denied*, 454 U.S. 827 (1981); *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Northwest Power Products Inc. v. Omark Industries*, 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978). There is nothing about this petition which distinguishes it from those.

While petitioners cite *Monsanto Co. v. Spray-Rite Service Corp.*, now pending before this Court, nothing that might be decided there could possibly disturb the lower courts' judgment here. The question presented in *Spray-Rite* is whether a *per se* vertical price-fixing claim may be proven by evidence that plaintiff distributor was terminated by defendant manufacturer following complaints by plaintiff's competitors to the manufacturer about plaintiff's lower prices.

But the question presented in *Spray-Rite* is not presented by the record below. There was no evidence that Jhirmack terminated petitioners at the request of another distributor or at the request of any salon customer of any distributor. There was no evidence that any distributor or salon complained to Jhirmack about the prices that petitioners charged. Nor was there evidence that Jhirmack ever complained to petitioners about their prices. Jhirmack's termination of petitioners was a decision unilaterally reached, for reasons which did not remotely bear upon the prices which petitioners wished to charge. Given petitioners' failure of proof, the courts below had no choice but to dismiss their claim. *First Nat. Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 284-90 (1968). Hence no matter what happens in *Spray-Rite*, the judgment of both lower courts here must stand.

CONCLUSION

This case vindicates the wisdom of *Sylvania*. Both courts below, applying *Sylvania*, recognized that Jhirmack's introductory plan of limiting distribution of its products to the professional salon trade fostered interbrand competition—"the primary concern of antitrust law." *Sylvania*, 433 U.S. at 52 n. 19. As recently declared in *A.H. Cox & Co. v. Star Machinery Co.*, 653 F.2d 1302, 1306 (9th Cir. 1981):

> "Competition is promoted when manufacturers are given wide latitude in establishing their method of distribution and in choosing particular distributors. Judicial deference to the manufacturer's business judgment is grounded in large part on the assumption that the manufacturer's interest in minimum distribution costs will benefit the consumer. A contrary rule would foster rigidity in distribution arrangements, a result antithet-

ical to a market dependent on vigorous competitive forces." (citations omitted)

Petitioners' request for a writ of certiorari so as to impugn that salutary antitrust premise should be denied.

Respectfully submitted,

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Dated: August 11, 1983